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SUPREME COURT OF THE UNITED STATES

October Term 1967

No. 1122

JIMMY D. GANDY and ALBERT J. BERRY
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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-and-

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SUPREME COURT OF THE UNITED STATES

October Term 1967

No. _____

JIMMY D. GANDY and ALBERT J. BERRY
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioners Jimmy D. Gandy and Albert J. Berry pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on December 11th, 1967.

OPINIONS BELOW

The judgment and commitment of petitioner Jimmy D. Gandy entered by the United States District Court for the Southern District of Florida is unreported and is

printed in Appendix C hereof, infra, App. 11-12. The Judgment and Commitment of petitioner Albert J. Berry is likewise unreported and is printed in Appendix D hereof, infra, App. 13-14.

The opinion of the United States Court of Appeals for the Fifth Circuit is as yet unreported and is printed in Appendix A hereto, infra, App. 1-9.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 11, 1967, (Appendix A, infra, App. 1-9). A timely petition for rehearing was denied on January 17, 1968 (Appendix B, infra, App. 10). The jurisdiction of this Court is invoked under 28 United States Code, § 1254(1).

QUESTIONS PRESENTED

I

Whether the act of a trial judge in appointing petitioner Berry's attorney to also represent petitioner, Gandy, who is an indigent, where no waiver of the fundamental Constitutional Right to assistance of (separate) counsel was obtained by the trial judge and where a serious conflict of interest existed, constituted a violation of the Sixth Amendment.

II.

Whether the Fifth Circuit's approval of the trial judge requiring the prosecutor to cross-examine Berry's

character witnesses with questions in the wrong form and the trial judge's failure to instruct the jury on the purpose and extent of cross-examination of character witnesses, constituted a direct conflict with prior pronouncements of law of this Court in *Michelson v. United States*, 335 U. S. 469, 69 S.Ct. 213, 93 L ed 168 and of the Court of Appeals for the Seventh Circuit in *United States v. Phillips*, 217 F.2d 435 (1954).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions the accused shall *** have the assistance of counsel for his defence".

The statutes under which the petitioners were charged are set forth in Appendix E, infra, App. 15.

STATEMENT OF THE CASE

The petitioners, Jimmy D. Gandy and Albert J. Berry, were jointly indicted in the United States District Court for the Southern District of Florida. The indictment was in twenty-three counts. The first count charged a conspiracy (18 U.S.C.A. 371) to transport stolen motor vehicles in interstate commerce knowing them to be stolen in violation of Title 18 U.S.C.A., § 2312 and that they conspired to receive, conceal, store, barter, sell and dispose of the stolen motor vehicles moving in interstate commerce knowing the same to be stolen in violation of Title 18 U.S.C.A.,

§ 2313. The remaining twenty-two counts charged substantive violations of the statutes.

Single Counsel Representing Adverse Interests
(Pursuant to Court Order)

Prior to trial, petitioner Berry retained Joseph P. Manners, a member of the Florida Bar, to represent him and to defend him against the charges contained in the twenty-three count indictment. Notwithstanding that petitioner Berry had already retained Joseph P. Manners, the trial court compelled Mr. Berry's counsel to also represent petitioner Gandy, who was adjudged insolvent (R 435, 436).

During the course of the trial, Mr. Berry, a businessman in the export field, testified that he bought certain automobiles from one, Mackey (R 276). He further testified that petitioner Gandy introduced him to the said Mackey (R 278). Mr. Mackey sold the automobiles in question to Mr. Berry with apparently valid titles from Alabama (R 277).

Petitioner Berry was in dire need of the testimony of petitioner Gandy in order to show the jury that he had no knowledge that the automobiles in question had been stolen. Yet Mr. Berry's own attorney could not call Mr. Gandy to the witness stand on behalf of Mr. Berry, as Mr. Manners determined that it would be in Mr. Gandy's best interest not to call him to the witness stand even though this decision would be against the best interest of his client, Berry.

The Cross-Examination of Petitioner Berry's Character Witnesses

Petitioner Berry called six character witnesses. The prosecutor indicated to the Court that he was going to inquire on cross-examination of the character witnesses whether they knew about Mr. Berry's application for citizenship in the United States and whether they knew that the application was withdrawn and the reason for such withdrawal (R 294, 296). The Court then advised the prosecutor that it would be proper for him to ask each witness:

> "If he *knows* anything about Mr. Berry's application for citizenship in the United States and whether or not that application was withdrawn and if he *knows* the reason why***" (R 296). (Emphasis added).

Petitioners' counsel objected to the prosecutor asking said questions and said objection was overruled (R 297). The prosecutor then proceeded to ask (in substantially the same form) each of the six character witnesses on cross-examination as follows:

> "Q Do you know whether or not the defendant, Albert J. Berry, withdrew his application for citizenship?***
>
> "Q Do you know if he withdrew it and the reason why?" (R 299-300; 302, 305, 306, 308, 309, 311).

In one instance the questions were asked of one character witness in the following form:

"Q Mr. Weinstein, *do you know that* in sometime in 1960 Mr. Berry made an application as to citizenship to become a citizen of the United States of America?
"A *I do not know that.*

"Q *Did you know*, sir that Mr. Berry withdrew his application for citizenship?
"A No sir, *I did not.*"

"Q And if Mr. Berry withdrew his application for citizenship do you not know, sir?"
"A No sir."

(R 308, 309) (Emphasis added).

The Trial court, after allowing the aforesaid questions to be asked of the character witnesses on cross-examination, failed to instruct the jury as to the purpose for the cross-examination as well as the extent to which it could be considered by the jury.

The case was submitted to the jury, which found both petitioners guilty on all twenty-three counts (R 436-438). The Trial court then entered its judgment and commitment as to petitioner Berry (R 440-442; Appendix D). The Trial court also entered its judgment and commitment as to petitioner Gandy (R 442-443; Appendix C).

The Court of Appeals for the Fifth Circuit affirmed the judgments (Appendix A). In its decision, the Court held that this Court's case of *Michelson*, supra, is a "Masterpiece in the field and particularly that language '(T)he

form of the inquiry "Have you heard?" is generally approved, and "Do you know?" is not allowed' ".

Further, by its judgment, the Fifth Circuit also held that a trial court has no duty to instruct a jury as to the purpose for which cross-examination of character witnesses is permitted as well as the extent to which it can be considered by a jury.

REASONS FOR GRANTING THE WRIT

I.

The petition for rehearing filed in the Court of Appeals for the Fifth Circuit charged that a fundamental and plain error was committed when the petitioners were denied their right to assistance of counsel contrary to the Sixth Amendment (R 461-462). The denial of this essential right occurred as follows:

Joseph P. Manners, a member of the Florida Bar, was retained by petitioner Berry to represent him in the twenty-three count indictment. Subsequent to Mr. Berry retaining Mr. Manners, the trial judge entered an order directing Mr. Manners, on the morning of the trial, to also represent petitioner Gandy, an indigent. (R 9, 435, 436). Mr. Manners was compelled to accede to the wishes of the trial judge as seen from his comments at the commencement of the trial:

"MR. MANNERS: (R 3)

May it please the Court, I am in a rather difficult position, if your Honor please. I do not

know what to do here. I would like to have a brief talk with Mr. Gandy about the opening statement. May I confer with Mr. Gandy before I announce?"

There was no intelligent and competent waiver of the right to (separate) counsel by the petitioner Berry appearing in the record. Further, as pointed out in the "STATEMENT OF THE CASE", Mr. Berry needed Mr. Gandy's testimony to prove that he (Berry) had no knowledge the automobiles in question were stolen. Although Mr. Manners, as attorney for Mr. Berry, would have called Mr. Gandy to the witness stand, Mr. Manners could not, as attorney for Mr. Gandy, allow the latter to testify. A grave and serious conflict resulted from the dual representation.

The denial of right to counsel under the facts and circumstances of the case, sub judice, was fully discussed by this Court in *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L ed 680. This Court in an analagous situation held:

> "'(A)ssistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a Court Order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valid constitutional safeguard is substantially impaired."

* * *

> "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

There is no question that petitioner Berry's defense was substantially prejudiced by his sharing counsel with his co-defendant at trial. Three of the government witnesses testified that petitioner Gandy gave them money to rent automobiles which were eventually shipped to Puerto Rico (R 14, 15, 18-20(22, 26, 96, 97, 127-129).

The evidence showed that petitioner Berry bought these rented automobiles from a Mr. Mackey who provided apparently valid titles from Alabama (R 276-278). Petitioner Gandy introduced Mr. Mackey to Mr. Berry (R 278). It is apparent that the government presented a stronger case against Mr. Gandy than it did against Mr. Berry. Nevertheless, both petitioners were severely prejudiced by being compelled to be represented by the same attorney.

The trial court and the Court of Appeals for the Fifth Circuit clearly violated petitioners' rights for assistance of counsel by forcing Mr. Berry to share his retained counsel with Mr. Gandy, notwithstanding that a conflict of interest existed and that petitioner Berry never waived his right to separate counsel.

II.

This Court in *Michelson v. United States of America* 335 U.S. 469, 69 S.Ct. 213, 93 L ed 168, which is a land-

mark case on cross-examination of character witnesses, held that the proper form of inquiry on cross-examination of a character witness is "Have you heard" and not "Do you know". The trial court, however, instructed the prosecutor that it would be proper form to ask each character witness on cross-examination "if he *knows* anything about Mr. Berry's application for citizenship in the United States and whether or not that application was withdrawn and if he *knows* the reasons why***". (R 296) (Emphasis added). In its opinion, the Fifth Circuit applauds the *Michelson* opinion as being a masterpiece in the field. Yet, the Fifth Circuit fails to follow the principles of law pronounced in *Michelson*, supra.

The trial court further compounded its error by allowing questions to be asked on cross-examination without instructing the jury as to the purposes for which the cross-examination was permitted as well as the extent to which it could be considered by the jury.

In *Michelson*, supra, the trial judge warned the jury on three occasions of the limited purposes of cross-examination of character witnesses. The Court of Appeals for the Fifth Circuit made only a passing reference in its decision to the failure of the trial judge to give a limiting instruction on the purpose of the cross-examination of the character witnesses. Nevertheless, the legal effect of the Fifth Circuit's judgment of affirmance is to create irreconcilable conflict with this Court's decision in *Michelson*, supra and also with the decision of the Seventh Circuit in the case of *United States v. Phillips*, 217 F.2d 435 (1954).

The case of *United States v. Phillips*, supra, held that there is a duty upon the government to tender the proper

instruction or upon its failure to do so there is a duty of the trial court of its own volition to instruct the jury as to the purposes for which the cross-examination of a character witness is permitted, as well as the extent to which it can be considered by the jury.

The trial court failed to instruct the jury that the incident concerning petitioner Berry's application for citizenship was not to be considered as having taken place. This left the jury to consider the "fact" of the application and its withdrawal as well as to speculate as to the reasons for the withdrawal (including the collateral matter of petitioner Berry being a foreigner).

It is respectfully submitted that this Honorable Court issue its Writ of Certiorari directed to the Court of Appeals for the Fifth Circuit and after a review of the decision, that it be reversed.

Respectfully submitted,

JOS. P. MANNERS -and- RICHARD M. GALE
City National Bank Bldg. Biscayne Building
25 W. Flagler Street 19 W. Flagler Street
Miami, Florida Miami, Florida
Attorney for Petitioners Attorney for Petitioner
Gandy and Berry Berry

By _____ By _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was mailed to Solicitor General, Department of Justice, Washington, D. C. this _____ day of February, 1968.

_____

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 23980

JIMMY D. GANDY and ALBERT J. BERRY,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Southern District of Florida

---

(December 11, 1967.)

Before BROWN, Chief Judge, COLEMAN and SIMPSON, Circuit Judges.

COLEMAN, Circuit Judge: This prosecution involved eleven stolen motor vehicles which were shipped from Miami to San Juan, Puerto Rico. The indictment was in twenty-three counts, the first count charged a conspiracy [18 U.S.C.A. 371] to transport stolen motor vehicles in interstate commerce knowing them to have been stolen, in violation of Title 18 U.S.C.A. § 2312. The remaining twenty-two counts charged substantive violations of the statute. Appellants were convicted on all twenty-three

counts. Berry was sentenced to three months imprisonment and fined $1,000 as to Count 1 and placed on three years probation. Gandy was given concurrent sentences of two years imprisonment on each of the counts. We affirm.

FIRST SPECIFICATION OF ERROR

An accomplice, not indicted, but named as a co-conspirator, testified for the Government. He was thoroughly cross examined by defense counsel as to any offers of leniency or reward in return for his testimony. At one point, he testified categorically, "I wasn't promised anything or any deals". Anticipating the argument of defense counsel that this testifying co-conspirator had specifically been given a reason to hope for or to expect some form of reward or leniency in return for his testimony, the prosecutor in his opening argument said, "I cannot tell you sincerely enough that that is absolutely false and that there is no basis in fact at all in the trial except [defense counsel's] own attempt to infer that..."

It is here argued that this statement by the prosecutor necessitates a reversal under the teachings of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217, and *United States v. Marchese*, 9 Cir., 1965, 341 F.2d 782.

The answer to this is that in *Napue* the witness falsely testified that he had received no promise or consideration in return for his testimony, whereas the prosecution had made such a promise and did nothing to correct the false testimony to the contrary.

In *Marchese*, a post conviction habeas corpus proceeding, there was an allegation that there had been an im-

proper agreement between the prosecuting attorney and the principal witness, not fully revealed.

In our opinion the principles involved in *Napue* and *Marchese* have no application here for there is absolutely no proof of any such promises or agreements in this record. It can be argued, as it was argued to the jury below in an attack upon the co-conspirator's credibility, that the sentence he received in the state courts might imply such an arrangement, at least with state officials. Even so, there is no testimony to contradict the positive statement that there was absolutely no promises or deals.

Moreover, before argument began the trial court expressly directed the attention of the jury "to the fact that what the lawyers have to say is not evidence and is not to be received by you as evidence". Certainly, lawyers in their jury arguments are never to make representations of fact on their own responsibility. They are advocates and not witnesses. At the same time, the language used here cannot clearly be said to constitute an individual representation but was merely an argument alluding to what the witness had said, that he had been promised nothing. And if this is not the case, certainly any possible prejudice to the defendants was clearly obviated by the positive pre-argument instruction of the court that what the lawyers have to say is not evidence and is not to be considered by the jury as evidence. Reversible error is not to be predicated on this occurrence.

SECOND SPECIFICATION OF ERROR

The appellant Berry took the stand in his own defense. He testified that the automobiles in question had

been offered to him "as repossessed cars from the finance company in the State of Alabama", that he never knew the cars were stolen, and that he treated them as legitimate products. On cross examination, he testified that he had no business dealings with co-defendant Gandy but he had one time sold him an air conditioner. He did, however, admit that the man from whom he allegedly bought the automobiles, by the name of Mackey, was introduced to him by Gandy. He admitted that he shipped the automobiles to Puerto Rico. He said that he paid cash for them and further conceded that the only records he had *with him* to show that he paid for the cars were bills of sale. He admitted that he had not issued any check in payment for any of the eleven cars in question.

He was asked:

Q. Now, what records do you have, business records, indicating the sale and purchase of these cars?

A. All my records are in [counsel's] hands.

Q. Does [counsel] have them?

A. Yes, sir.

Q. May I see them?

COUNSEL. No, you didn't show me any records. You did not show me your work product. It is unfair.

PROSECUTOR. These are not work products. These are his records, the defendant's records.

THE COURT. Sustained.

PROSECUTOR (Addressing Berry).

Q. Are you willing to show me the books and records showing the notations of the sales of these cars and the purchases?

A. If my attorney says so.

BY COUNSEL. I say no. If your Honor please, I would like the jury admonished as to the law here or the principle involved.

THE COURT:

"Gentlemen of the jury, you are not to draw any inference, any unfavorable inference from this. The defendants are not required to produce records unless they desire to do so, and you are not to draw an unfavorable inference from his lawyer's refusal to produce the record".

During his closing argument the prosecutor argued that if Mr. Berry had hard, cold documentary evidence in the form of ledgers or journals showing these transactions to support his testimony he would have shown them to the jury, hence it was plain and simple that there are no such documents.

Upon objection by defense counsel the Court responded, "I have ruled on this, and I ruled on it yesterday, and the ruling yesterday was, and shall remain the same, that [the prosecutor] could not benefit by calling upon the defendants' counsel for the production of records... [A]nd there the matter rests".

We find no error in this episode.

The situation is governed by the principles stated in *Carpenter v. United States*, 4 Cir., 1959, 264 F.2d 565:

> "Firmly rooted in our judicial history is the principle that a defendant in a criminal case, who cannot be compelled to testify and whose failure to do so may not be made the subject of adverse comment, cannot prescribe and impose limitations upon his waiver of his privilege against self-incrimination when he voluntarily takes the witness stand. When he chooses to testify freely to those events and circumstances which tend to support his defense, neither the Constitution nor any consideration of justice requires that he be permitted selectively to suppress other relevant facts which may be incriminating or inconsistent with his defense. '(H)e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' *Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S.Ct. 944, 949, 44 L.Ed. 1078, 1083. 'When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him.' *Caminett v. United States*, 242 U.S. 470, 494, 37 S.Ct. 192, 198, 61 L.Ed. 442, 456."

In *Johnson v. United States*, 1943, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704, rehearing den. 318 U.S. 801 62 S.Ct. 826, 87 L.Ed. 1164, it was held that the voluntary offer of an accused to testify on any fact waives the right to assert the privilege against self-incrimination and to refrain from testifying as to such fact and others fairly related reasonably thereto. See also *Claunch v. United States*, 5 Cir., 1946, 155 F.2d 261.

The prosecutor was entitled to ask the witness about his records and his willingness to produce them. We do not pass upon the question of requiring the attorney to produce records in his possession because the trial court flatly declined to require it and very emphatically instructed the jury to ignore that item. The appellant certainly got the benefit of that "merciful discretion" alluded to by Mr. Justice Frankfurter in his concurring opinion in *Johnson, supra.*

THIRD SPECIFICATION OF ERROR

Berry called six character witnesses. On cross examination the prosecutor questioned each of them in substantially the following form:

Mr. _____, do you *know* [emphasis supplied] that sometime in 1960 Mr. Berry made an application to become a citizen of the United States of America?

* * *

Q. Did you *know* [emphasis supplied] that Mr. Berry withdrew his application for citizenship?

There were eight character witnesses, including an attorney, a certified public accountant, a general contractor, an insurance agent, and other business men. Only one or two of them knew [or had heard] of Berry's application *and none knew of its withdrawal.* There is no question, however, that there had been such a withdrawal.

The appellant argues that it was improper to ask the witnesses whether they *knew* of such an event but that the proper form of the question should have been whether or not they had *heard,* citing *Michelson v. United States,* 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948). *Michelson* did so hold. The Government concedes that the questions were not in the proper form, but argues that under all the facts and circumstances of the case this was not so prejudicial as to justify reversal. Appellant further argues that in any event this was not a proper subject for cross examination.

As stated in *Michelson,* when the defendant put his general reputation in issue he threw open the entire subject. The question propounded by the prosecutor was permissible, except that the witnesses should have been asked if they had *heard* of the withdrawal, not if they *knew* of it. Michelson clearly holds, however, that "rarely and only on clear showing of prejudicial abuse of discretion will courts of appeal disturb rulings of trial courts on this subject". As taught in *Michelson,* the District Judge held a hearing outside the presence of the jury [*Roberson v. United States,* 5 Cir., 1956, 237 F.2d 536] to determine that there was a factual basis for the inquiry. We do not think that the awkward use of the word "Know" instead of the word "hear" could have possibly resulted in any prejudice to this appellant. It may well have been to his

advantage. It is not unlikely that the witnesses could have heard of the withdrawal *but did not know it.* The defendant thus got the benefit of that distinction. The jury was left with no proof that the application withdrawal was really a fact. Interestingly enough, neither the trial judge nor any of counsel referred to this citizenship item in the instructions or argument to the jury. Prosecutors, however, would be well advised to carefully acquaint themselves with the opinion in *Michelson*, clearly a masterpiece in the field, and particularly that language, "[T]he form of the inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed".

AFFIRMED.

APPENDIX B

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 23,980

JIMMY D. GANDY and ALBERT J. BERRY,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING

(January 17, 1968)

Before BROWN, Chief Judge, COLEMAN AND SIMPSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED.

APPENDIX C

JUDGMENT AND COMMITMENT— JIMMY D. GANDY

(Number and title omitted) (Filed: August 5, 1966)

On this 5th day of August, 1966 came the attorney for the government and the defendant appeared in person and by counsel, Joseph P. Manners, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Jury Verdict of Guilty of the offense of interstate transportation of stolen motor vehicles, and receiving, concealing, storing, bartering and selling motor vehicles, knowing same to have been stolen, and conspiracy, in violation of Title 18, United States Code, Sections 2312, 2313 and 371, as charged in Counts 1 thru 23 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS as to each of Counts 1 thru 23 inclusive, or until otherwise discharged by due process of law, said sentences of confinement to run concurrently with each other.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ David W. Dyer

DAVID W. DYER

UNITED STATES DISTRICT JUDGE

The Court recommends commitment to:

_____

Clerk.

APPENDIX D

JUDGMENT AND COMMITMENT

(Number and title omitted) (Filed: August 5, 1966)

On this 5th day of August, 1966 came the attorney for the government and the defendant appeared and by counsel, Joseph P. Manners, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Jury Verdict of Guilty of the offense of interstate transportation of stolen motor vehicles, and receiving, concealing, storing, bartering and selling motor vehicles, knowing same to have been stolen, and conspiracy, in violation of Title 18, United States Code, Section 2312, 2313 and 371, as charged in Counts 1 thru 23 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) MONTHS as to Count 1, or until otherwise discharged by due process of law, it being further

ORDERED AND ADJUDGED that Defendant shall pay a fine unto the United States of America in the sum of ONE THOUSAND ($1,000.00) DOLLARS as to Count

1, and upon default, to stand committed to the custody of the Attorney General or his authorized representative for imprisonment until payment, or until otherwise discharged by due process of law, and it is further

ADJUDGED that imposition of sentence as to each of Counts 2 thru 23 inclusive shall be withheld, and the Defendant placed on probation with this Court for a period of THREE (3) YEARS as to each of said Counts under the Standing Conditions of Probation outlined in the Court's Order entered August 1, 1964, said periods of probation to run concurrently with each other.

IT IS ORDERED that execution of sentence of confinement shall be deferred until 9:00 A.M. Monday, August 8, 1966 at which time Defendant shall surrender himself to the United States Marshal at Miami, Florida.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ David W. Dyer

DAVID W. DYER

UNITED STATES DISTRICT JUDGE.

The Court recommends commitment to:

_____

Clerk

APPENDIX E

18 United States Code, § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than 5 years, or both. ***

18 United States Code, § 2312

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than 5 years, or both.

18 United States Code, § 2313

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than 5 years, or both.

LIBRARY
SUPREME COURT, U. S.

No. 1122

FILED
MAR 14 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

JIMMY D. GANDY AND ALBERT J. BERRY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

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MELVYN HAMBURG,
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Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1122

JIMMY D. GANDY AND ALBERT J. BERRY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 386 F.2d 516.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1967. A petition for rehearing was denied on January 17, 1968. The petition for a writ of certiorari was filed on February 15, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner Berry was prejudiced by the court's appointment of his retained counsel to represent his indigent codefendant.

2. Whether the form of question used by government counsel in cross-examination of character witnesses requires reversal.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of transporting and selling stolen automobiles in interstate commerce in violation of 18 U.S.C. 2312 and 2313 (counts 2-23) and conspiracy to do so (count 1). On August 5, 1966, petitioner Berry was sentenced to imprisonment for three months and fined $1,000 on count one; on the remaining counts he was placed on probation for three years. Petitioner Gandy was sentenced to imprisonment for concurrent two-year terms on all counts. The court of appeals affirmed (Pet. App. A).

The evidence showed that from April to July, 1964, a number of automobiles were rented for a week's duration from agencies in the Miami, Florida, area by Eugene Umanski, Donald Persall, and Doris Popola.[1]

[1] Umanski was indicted in a state court and, following a plea of guilty, served a six-month sentence (R. 28-29). Both Persall and Popola pleaded guilty in Newark, New Jersey, and received two-year sentences, suspended with probation for three years (R. 102, 129).

They had obtained driver's licenses under fictitious names, and they used the licenses as proof of identity when they entered into agreements with the rental agencies (R. 18, 20, 22-23, 68-69, 75, 87-88, 91, 96-97, 109-110, 127-129, 136, 140).[2] Persall and Miss Popola delivered their rented cars to Umanski, who turned them over to petitioner Gandy for a $200 consideration, which Umanski shared with the others (R. 18-23). Umanski himself obtained five rental cars for Gandy, and received $200 per car plus the rental charge, which he retained (R. 22). On several occasions, Umanski helped Gandy remove the rent-a-car decals, serial number plates, and license plates, and affix Alabama plates to the cars (R. 24).

On the day following the delivery of the cars to Gandy, they were placed on a fast boat and shipped to Puerto Rico under a bill of lading secured by petitioner Berry in the name of a corporation which he owned (R. 145-169). Berry sold the cars to individuals or automobile sales agencies in the San Juan area for $300-$400 less than the usual price paid for the particular model of car purchased (R. 178, 206, 221, 224-226).

ARGUMENT

1. Prior to trial, Berry's retained counsel, Joseph P. Manners, was appointed by the court to represent codefendant Gandy, who was indigent. Manners gave no indication that he could not represent both de-

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[2] Citations are to the the record of trial, filed with the clerk of this Court.

fendants. In his opening statement Manners advised the jury that when he objected on behalf of Gandy, they should consider that he represented Gandy, and that when he objected on behalf of Berry, they should recognize that he represented Berry. Counsel told the jury that he would tell them when he was standing up on behalf of both defendants. Throughout the trial no incident arose requiring defense counsel to take a position beneficial to one defendant at the expense of the other. Indeed, all but one of the witnesses who testified for the prosecution knew only one of the defendants. The one exception, Umanski, testified at length regarding his association with Gandy, but only summarily about his one conversation (by telephone) with Berry. No motion for severance was made before or during the trial. Nor was any claim asserted by counsel that any of the government's evidence, while admissible as to one defendant, was inadmissible or prejudicial as against the other defendant whom he represented. Nor was any claim made on appeal to the Fifth Circuit that counsel's representation of both defendants constituted a conflict of interests.

For the first time, in a petition to the court of appeals for rehearing, counsel made the argument which he urges before this Court, that the representation by Mr. Manners of both defendants prejudiced Berry, because counsel could not call upon Gandy to testify on Berry's behalf, since such testimony would not have been in Gandy's best interests.[3] This argu-

[3] We note that neither of the contentions in the petition allege any prejudice to petitioner Gandy.

ment is too belated to be convincing. There is no reason to believe that, if Gandy had been tried separately, or were represented by other counsel, he would have waived his privilege against self-incrimination and chosen to take the stand for his co-defendant. In view of the extent to which Gandy was implicated in the car theft ring by the government's evidence, it is unrealistic to suppose that his counsel would have risked putting Gandy on the witness stand. The very contention in the petition is that it would have been contrary to Gandy's interest for his lawyer to permit him to testify. Nor is there any reason to believe that, if he did testify, Gandy would have exculpated Berry, especially in light of Umanski's testimony tying them together in the stolen car operation. The mere fact of dual representation without any showing of ineffective service to Berry is not ground for reversal. *United States* v. *Cosentino*, 372 F.2d 61 (C.A. 7); *United States* v. *Berriel*, 371 F.2d 587 (C.A. 6); *United States* v. *Paz-Sierra*, 367 F.2d 930, 932-933 (C.A. 2), certiorari denied, 386 U.S. 935; see *Glasser* v. *United States*, 315 U.S. 60, 76; see also *United States* v. *Kahn*, 381 F.2d 824, 841 (C.A. 7), certiorari denied, 389 U.S. 1015; *Gorin* v. *United States*, 313 F.2d 641, 645-646 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Armone*, 363 F.2d 385, 405-406 (C.A. 2), certiorari denied, 385 U.S. 957.

2. After Berry had taken the witness stand, defense counsel called eight character witnesses on his behalf. During the cross-examination of the first one, Philip Cook, the following colloquy occurred (R. 293):

> Q. (By government counsel, Mr. Foosaner): Now, Mr. Cook, have you heard . . .
>
> MR. MANNERS (Defense Counsel): If your Honor please, I object.
>
> MR. FOOSANER: Let me finish my question.
>
> MR. MANNERS: I know what you are leading up to. You have shown it to me. May we have a conference at the bench without the jury present?

The jury was excused, after which the court heard government counsel state that he intended to ask the witness whether he had heard that, during 1960-1962, the Immigration and Naturalization Service had received numerous complaints that Berry, while in Venezuela, had taken more than $200,000 from employers, and whether he had heard that the files of the Immigration and Naturalization Service contained complaints from businessmen in three continents relative to Berry's illegal activities (R. 294-295). The trial judge considered the extent to which he would permit this line of cross-examination, and concluded that he would restrict it to questioning the witness "if he knows anything about Mr. Berry's application for citizenship in the United States and whether or not the application was withdrawn, and if he knows the reasons why" (R. 296). Defense counsel continued to object on the ground that the information regarding Berry's citizenship status was based upon hearsay (R. 297-298). The objection was overruled. On cross-examination of Cook and six other character witnesses, government counsel posed the questions regarding Berry's citizenship in the format approved by the trial judge beginning

with the phrase "Do you know." Of the seven, only three responded that they knew that petitioner had applied for citizenship, and none of these had known that he had subsequently withdrawn his application (R. 299, 302, 305, 308-309, 311, 313, 318).

Although counsel at trial raised no objection to the form of the question which the court permitted government counsel to pose to Berry's character witnesses, on appeal he claims that, pursuant to this Court's instructions in *Michelson* v. *United States*, 335 U.S. 469,[4] the mere use of the "Do you know" form of questioning constituted prejudicial error. This is a strained interpretation of the Court's decision. *Michelson* reviewed the scope of cross-examination of character witnesses, pointing out that once the defendant affirmatively initiates a character inquiry by reference to hearsay which a witness might have heard, the prosecution may test the sufficiency of the hearsay by asking, under court supervision, other questions regarding actual events "which would probably result in some comment among acquaintances if not injury to defendant's reputation." 335 U.S. at 481. This Court gave the trial judge wide discretion "accompanied by heavy responsibility * * * to protect the practice from any misuse." 335 U.S. at 480.

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[4] "Since the whole inquiry, as we have pointed out, is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquriy, 'Have you heard?' has general approval, and 'Do you know?' is not allowed." *Michelson* v. *United States*, 335 U.S. 469, 482.

In this case the trial judge fulfilled his responsibility by determining that the proposed area of inquiry referred to an actual event, and by reviewing, out of the presence of the jury, the extent to which he would allow the prosecution to pose questions on cross-examination of the character witnesses. The questions were originally framed by government counsel in the format of "have you heard?", but were amended upon the court's instructions. No complaint as to the form of question was raised although the defense excepted to the hearsay nature of the prosecutor's information. The limited function served by this testimony was explained to the jury in the court's closing instructions. In light of these circumstances, petitioners have not made a "clear showing of prejudicial abuse of discretion," *Michelson* v. *United States*, 335 U.S. at 480. As noted by the court of appeals (Pet. App. 8-9), the difference between the two forms of expression was not sufficiently great to warrant the exercise of an appellate court's supervisory power to reverse the conviction, especially since the form used "may well have been to [petitioner's] advantage" (*ibid.*) and his counsel did not object to it. *Kasper* v. *United States*, 225 F.2d 275, 279-280 (C.A. 9); *Saunders* v. *United States*, 192 F.2d 409, 411 (C.A.D.C.); see also *United States* v. *DeAlesandro*, 361 F.2d 694, 700 (C.A. 2), certiorari denied, 385 U.S. 842; *United States* v. *Alker*, 260 F.2d 135, 151 (C.A. 3), certiorari denied, 359 U.S. 906; *Malatkofski* v. *United States*, 179 F.2d 905, 912 (C.A. 1).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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